from the plaintiffs who were unaware of the whole transaction. Counsel, however, has not been able to support this contention with any authorities. It seems to me that it is very difficult to draw any distinction between this case and the cases cited which shew that it is not competent to the defendant to set up the supposed fraud. The defendant must be treated as having done that which he ought to have done. It remains to ascertain what sum is due to the plaintiffs under the trust deed if defendant had not wrongfully prevented anything from becoming due. That sum I fix at $10,000 being the sum for which the properties referred to in paragaph 4 of the plaint were taken over by the Bank of Malaya together with interest thereon at 8% from 1st January, 1932 until payment. Judgment will be entered for the plaintiffs accordingly with the taxed costs of the suit.

Judgment accordingly.

[ORIGINAL CIVIL JURISDICTION]

HEREFORD, J.

November 17, 1933.

TAN HEE JUAN BY HIS NEXT FRIEND TAN SEE BOK.....Plaintiff.

v.

TEH BOON KEAT
LAI SOON

Defendants.

[NEGRI SEMBILAN CIVIL SUIT No. 5 of 1933]

Land Code 1926, s.42—Transfer executed by a minor—Order avoiding the transfer—Discretion of Court to order refund of purchase money—Specific Relief Enactment, ss. 38 and 41.

The plaintiff, an infant, executed transfers of lands in favour of the defendants. The transfers were witnessed and subsequently registered.

The plaintiff by his next friend applied to the Court for an order setting aside the transfers and for incidental relief.

The Court made an order declaring the transfers void, and refused to order the refund of the purchase price paid by the defendants.

Held, that the discretion possessed by the Court under the Specific Relief Enactment will, in the case of contracts which are void, only be exercised where the parties stand in such a fiduciary relationship to one another that it would be unfair to the defendant to allow the plaintiff to retain both the advantage of the purchase money standing as part of his Estate and also to recover the property.

Dutt for Plaintiff.

Hastings for Defendants.

Cur. Adv. Vult.

HEREFORD, J.—In this case it appears that two transfers were executed by the infant Plaintiff of two pieces of land in Mentakab to the two Defendants respectively, and the action actually brought by the Plaintiff's next friend appointed by an order of Court is to have these two transfers set aside and other relief incidental thereto, on the ground that at the time the transfers were executed the Plaintiff herein was a minor. There is no doubt about that fact: it is quite clear now, and I do not think it is seriously disputed, that at the time when the transfers were executed the Plaintiff, Tan Hee Juan, was in fact an infant and, therefore, unable to contract.

The Privy Council have held that the effect of sections 10 and 11 of the Contract Act of India is that an infant cannot make a contract within the meaning of the Act, and that a contract made by an infant is not only voidable but void. (*Mohori Bibee* v. *Dharmodas Ghose*, 30 Calcutta 539). That decision of the Privy Council is binding on this Court, and therefore there can be no doubt whatever that those transfers are void. That being so, as the registration of these proprietors has been obtained by a void instrument, the effect of section 42(iii) of the Land Code is that the registration is void, and I have no option or alternative that I know of or can discover but to declare that registration void. That has the effect of restoring the property to the minor, and the order which I will have to make will be to that effect. To my mind there is no way of avoiding that decision, although I realise there may be circumstances in this case which may make it a harsh one because the Defendants say they had no reason to suppose that the vendor was in fact an infant. Some underhand work in connection with these transfers probably took place, because attached to the transfers there is a certificate by a Solicitor to say that the vendor was in fact of full age. How he came to sign that certificate there is no evidence to shew, but it is difficult to avoid the conclusion that some deception was practised. The Defendants do not claim that there was any deception practised on them: they appear to have accepted the transfers without troubling to enquire who the vendor was and did not even take the trouble to see him. They do not suggest that an adult was put off upon them as the vendor, and the evidence of the infant himself is that he signed these transfers actually in the Solicitor's office while the evidence of the Defendants also shews that they attended the Solicitor's office where they signed the transfers as transferee. It is possible that they and the Plaintiff attended at different times, but I think that the purchaser of these lands who purchased without enquiring as to who the vendor was or taking any steps to see him, must take the consequences if it turns out subsequently that the vendor was an infant and the contract void. However that might be, to my mind, it does not relieve me of the necessity of declaring these two transfers void.

The real question that I have to decide in this case is whether I ought to order that the purchase prices of these lands which were admittedly paid by the Defendants should be refunded to them as a condition precedent to the cancellation of these two transfers. The first case quoted

is the case to which I have referred. At page 549 the following passage occurs:—

> "Another enactment relied upon as a reason why the mortgage money should be returned, is section 41 of the Specific Relief Act (1 of 1877), which is as follows:—
>
> "'Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.'
>
> "Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but the Court of First Instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

Now, that part of the judgment of the Privy Council in this case has been held in the textbooks to be an authority for the Court having a discretion in proper cases to order the refund of the purchase money. I find myself doubtful whether the case really goes so far, because the judgment continues as follows:—

> "It was also contended that one who seeks equity must do equity. But this is the last point over again and does not require further notice, except by referring to a recent decision of the Court of Appeal in *Thurstan* v. *Nottingham Permanent Benefit Building Society* since affirmed by the House of Lords. In that case a female infant obtained from the Society of which she was a member part of the purchase-money of some property she purchased; and the Society also agreed to make her advances to complete certain buildings thereon. They made the advances and took from her a mortgage for the amount. On attaining 21 she brought the action to have the mortgage declared void under the Infants Relief Act. The Court held that, as regards the purchase-money paid to the vendor, the Society was entitled to stand in his place and had a lien upon the property; but that the mortgage must be declared void and that the Society was not entitled to any repayment of the advances.
>
> "Dealing with this part of their claim Lord Justice Romer says at page 13: 'The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void.' So here."

Therefore I think it is right to say that if the Privy Council's decision is that there is a discretion, in a case of this sort, to order the refund of the purchase money, it is only where there are very unusual circumstances that that discretion can be exercised.

A good many cases have been quoted to me during the arguments in this case, but I think I am correct in saying that there is only one case quoted in which the Court has exercised the discretion, which it is alleged to have under section 41 of the Specific Relief Enactment, or of the Specific Relief Act of India. That case is the case of *Dattaram* v. *Vinayak*, 28 Bombay 181 where money which had been paid upon a mortgage was ordered to be refunded by the Court of Appeal. In that case the following words occur on page 192 of the report:—

> "The facts in the case of *Mohori Bibee* v. *Dharmodas Ghose* show that the restitution there claimed but disallowed had no other basis than that of a simple money demand—the person who had lent money to the minor on a mortgage knew the debtor was a minor, there was no fiduciary or other relation between the two to give rise to an equity in favour of the creditor, and the minor had dissipated the money in extravagance. In the present case the restitution claimed is not a mere money demand; the parties (defendants 1 and 3) stand in a state of accountability to each other; and the amount claimed by defendant 1 stands as part of the mortgage account which defendant 3 wishes to reopen."

That, so far as I know, is the only case to which I have been referred in which the discretion under section 41 of the Specific Relief Enactment or Act has been exercised, and it seems to me that, before such discretion is exercised, there must be some fiduciary relation between the parties. Now, in this case, there is no such relation at all between the parties. They never saw each other; neither did the two defendants see the vendor, nor did the infant vendor see the persons to whom the lands were to be sold. Furthermore, I think that the principle at the back of this section giving the Court a discretion to order refund of the purchase money or the mortgage money, as the case may be, is this: it would be unfair to the defendants that if the infant has had the advantage of the purchase money or the proceeds of the mortgage he should have the advantage of being the owner of the property as well without being called on to return that money or those proceeds. In this case, the infant Plaintiff's estate "qua" such has not received any advantage at all. The

mother says she received the $17,000/- and spent $15,000/- on the estate: that is not the infant's estate "qua" such. The balance of the money, she says, was used in maintaining this family of which the infant plaintiff was a member. There again, although he has received the benefit of a portion of this money it cannot be said, it seems to me, that his estate had the advantage of all or any part of the purchase money and that therefore I can order its refund.

A number of English cases were cited to me in some of which restitution by the infant has been ordered, but in the cases of *Valentini* v. *Canali*, (1889) 24 Q.B.D. 166 and *Steinberg* v. *Scala Ltd.*, (1923) 2 Ch.D. 452 the contracts were contracts which in the view of the Common Law were not void but only voidable, and the principle on which restitution is ordered is different in such cases as compared with cases where the contract is absolutely void.

This appears to me to be well brought out in the case of *Thurstan* v. *Nottingham Permanent Benefit Building Society*, (1902) 1 Ch.D. 1. In that case the infant had borrowed money from the Defendant Company—

(a) to complete purchase of the property,
(b) to effect certain improvements to the property,

and had executed a mortgage in favour of the Defendant Company for the total sum due. The trial Judge held that that transaction was one transaction and was therefore voidable, but the House of Lords confirming the decision of the Court of Appeal held that in fact there were two transactions and that while (a) was a voidable transaction (b) by virtue of the provisions of the Infants Relief Act was absolutely void. As a result the Defendant Company was given relief in regard to (a) but not in regard to (b), and it is in the judgment of Romer, L.J., in relation to the second part of this case that the following words occur:—

> "A court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void."

Although the decision which I have come to may be a harsh one to the Defendants, it is my duty to protect the interests of the infant while he is an infant, and I have to take such steps as the law provides to protect the property even against his will: the infant now says that he does not want the property protected. What the infant thinks or says about the property, while he is still an infant, is, I am afraid, a consideration which cannot move me.

It has been suggested that Tan See Bok was not the proper person to bring this suit because he is not the Plaintiff's lawful guardian. On that point I merely say that Tan See Bok was appointed the next friend of the plaintiff in this case by an order of Court; that order of Court clearly stands until it is set aside. If the infant or any of the infant's people think that it was an improper one or that somebody should be appointed in his place, an application should have been made to the Court to that effect. The mother was originally a Defendant in this suit but action was successfully taken to have her name struck out. If there is any justification for saying that Tan See Bok is not the proper person to bring this suit, there has been ample opportunity for action to be taken to have that order set aside, and it is a matter with which I cannot now deal.

Under these circumstances, it seems to me that the only order I can make is an order that the transactions are void. I therefore declare that the two transfers registered 37 and 38, volume 39, in the Registry of Titles, Kuala Lipis, are void and that the registrations of the two Defendants as proprietors by virtue of these deeds are also void. The Defendants to pay the costs.

Judgment accordingly.